IN THE
SUPREME COURT OF THE UNITED STATES

NO. 73-5845

Catherine Jackson, On Behalf of Herself and
All Others Similarly Situated

Petitioner

VS

Metropolitan Edison Company, A Pennsylvania
Corporation

Respondent

Petitioner's Reply Brief

Petition For A Writ Of Certiorari To
The United States Court of Appeals
For the Third Circuit

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HISTORY

On November 30, 1973, Petitioner filed this Petition for Writ of Certiorari, contending that the court below erred in holding that the Respondent did not act under color of law in terminating Petitioner's electrical services for non-payment of a bill. On December 31, 1973, Respondent filed a brief in opposition to the within Petition, contending that no state action exists herein namely because the Respondent acts in a purely private capacity in furnishing and terminating utility services,which services the state is under no legal duty to provide. This Reply Brief is filed in response to Respondent's brief, in support of the proposition that Respondent acts under color of law in performing a public function.

SUMMARY OF ARGUMENT

In addition to satisfying the other tests or indices of state action (i.e., substantial regulatory control, beneficiary of a state created monopoly, statutory standard of reasonableness of operations, and failure of the state to exercise its power over a particular activity) the Respondent also acts under color of law in terminating a customer's electrical services because it is engaged in a public function and because it performs the governmental duty of supplying Pennsylvania residents with reasonably continuous utility services. The public function and governmental duty of furnishing reasonably continuous utility services is manifested in the Pennsylvania Public Utility Code. Thus, the Commonwealth of Pennsylvania, through its Public Utility Commission has the statutory duty to enforce the provisions of the Public Utility Code, 66 P.S. §1101 et seq., and to thereby protect the interests of the public by assuring that customers of privately owned, state-regulated public utility companies receive reasonably continuous utility service and not be subject to arbitrary termination of such service for non-payment of a utility bill.

REASON FOR GRANTING THE WRIT

The thrust of Respondent's arguments in opposition to granting of the Writ is that state action does not exist herein unless the Respondent is performing a governmental function which the state is under a legal duty to provide.

Respondent devotes little space to the other tests of state action, (i.e., substantial regulatory control, beneficiary of a state created monopoly, statutory standard of reasonableness and failure of the state to exercise its power over a particular activity) and thus implies that the "public function" test is the sole test to be considered. As set forth in the Petition for Writ of Certiorari, it is the cumulative effect of all of these indices and tests which establish the existance of state action herein. It is submitted that Respondent engages in a public function in supplying reasonably continuous utility services to its customers pursuant to the regulation of the Pennsylvania Public Utility Commission, and thus, for this and the above reasons, Respondent acts under color of law herein.

Respondent argues that the state has no legal duty to provide utility services to its citizens and hence, Respondent's actions in terminating utility services to customers are not acts under color of law. Respondent additionally argues that state action cannot exist in situations including the instant case, where it takes termination action allegedly pursuant to its own rules rather than pursuant to any state participation or authority.

In support of its position that the state has no duty to furnish utility services, Respondent relies on two old Pennsylvania Supreme Court cases. In Bailey vs Philadelphia, 184 Pa. 594 (1898) the court stated that the city had no municipal duty to supply its citizens with public street lighting. However, that case involved a challenge to the legality of a lease by the City of its gas works to a private corporation for the purpose of continuing to provide such services. However, the court noted that whether the legislature may "hereafter impose" upon the City a municipal duty in regard to lighting is a question which it need not consider "until the case shall arise." Supra, p. 606.

In this regard, it is submitted that such a duty has now been "imposed" upon the state by enactment of the Pennsylvania Public Utility Code. It should further be noted that this case and the one below were obviously decided prior to enactment the original Public Utility Code, Act of July 26, 1913, P.L. 1374, amended by Act of May 28, 1937, P.L. 1053, 66 P.S. §1101 et seq.

Respondent also cites the case of Girard Life Ins. Co. vs Philadelphia, 88 Pa. 393 (1879) which states that since the supplying of water and gas to a city was not a municipal duty, the city could terminate the water supply of a corporation which tendered water rent for only one of three years water arrearages, following its purchase of the foreclosed property. However, even though the city may not originally have had a duty to furnish such services, the Court noted that the city may adopt rules regarding use of and payment for such water, but once a "license" has been given by the city to the owner of a house to "use" the water:

> ". . . such license may not be withdrawn arbitrarily, or from mere caprice." Supra, p. 394.

It is submitted that the above statement anticipates and is precisely in keeping with the "entitlement" theory established by recent decisions of this Court. Thus, although the government may not have an original duty to provide its citizens with certain benefits or services, once such a function has been undertaken it cannot be withdrawn arbitrarily. Such a withdrawal of benefits becomes a "taking" of property, which subjects it to the requirements of due process of law. In this regard, it is immaterial whether such benefits are labelled as "rights" or "privileges", since once furnished, they rise to the level of "entitlements", the termination of which is limited by constitutional restraints. Graham vs Richardson, 403 U.S. 365 (1971); Bell vs Burson, 402 U.S. 535 (1971); California Department of Human Resources vs Java, 402 U.S. 121 (1971); Sniadach vs Family Finance Corp., 395 U.S. 337 (1969); Goldberg vs Kelly, 397 U.S. 254 (1970); Sherbert vs Verner, 374 U.S. 398 (1963); Slochower vs Board of Higher Education, 350 U.S. 551 (1956); Speiser vs Randall, 357 U.S. 513 (1958).

In this regard, it is interesting to note that in considering termination of utility services, courts in other jurisdictions have recently held that not only does the government have a duty to furnish utility services, but such services become an entitlement, subject to due process protections. Thus, in Davis vs Weir, 328 F.Supp. 317 (N.D. Ga., 1971) the court stated:

> "In operating as a public service, and an apparent monopoly, the City necessarily is obligated to furnish water to all members of the municipality upon application, subject only to the reasonable, non-dis-

criminatory rules and regulations of the Department of Water Works. The Court believes that the fact that the City has undertaken to provide water to all members of the municipality upon application (which it has the duty to do) renders the important benefit bestowed by the City sufficiently analogous to an 'entitlement' to satisfy any requirement along this line in the recent Supreme Court decisions. Goldberg vs Kelly, supra; Bell vs Burson, supra." Supra, pp. 321, 322.

Also see Ihrke vs Northern States Power Co., 459 F.2d 566 (C.A. 8, 1972) cert. granted, vacated on mootness 34 L.Ed.2d 72 (1973); Palmer vs Columbia Gas Co. of Ohio, 479 F.2d 153 (C.A. 6, 1973); Stanford vs Gas Service Co., 346 F.Supp. 717 (D., Kan., 1973); Bronson vs Consolidated Edison Co., 250 F.Supp. 443 (S.D.N.Y., 1972).

Similarly, in Pennsylvania, the state has a statutory duty to assure that its citizens receive reasonably continuous utility services furnished by privately owned, state regulated public utility companies. The Pennsylvania Public Utility Code, 66 P.S. §1101 et seq., provides the exclusive means of furnishing utility services within the Commonwealth of Pennsylvania, and thus the legislature established the Public Utility Commission, 66 P.S. §452, with the power and duty to administer and enforce the Public Utility Code, 66 P.S. §§461, 462. Pursuant to the Act, no public utility is allowed to furnish services without the prior approval of the Public Utility Commission, 66 P.S. §1121. A public utility must obtain a "Certificate of Public Convenience" from the Commission, which certificate will be granted only after a determination that "the granting of such certificate is necessary or proper for the service, accomodation, convenience or safety of the public." 66 P.S. §1123. In this regard, it has been held that the obligation to serve the public is inherent in every certificate of public convenience and a public utility may not choose to operate only when the weather is pleasant or when there is a chance for profit. Columbo vs Pa. P.U.C., 159 Pa. Super. 483, 48 A.2d 59 (1946). Thus, whether or not the Commonwealth of Pennsylvania originally had a duty to furnish its citizens with utility services is immaterial in view of the fact that the state has undertaken such a function through enactment of the Public Utility Code.

The Public Utility Code requires that every public utility furnish service, and that such service shall also be "reasonably continuous and without unreasonable

interruptions or delay." 66 P.S. §1171. Furthermore, no public utility may "Subject any person to any unreasonable prejudice or disadvantage." 66 P.S. §1172. The Code further provides that the Commission shall have the power and authority to supervise and regulate all utilities doing business within the Commonwealth. 66 P.S. §1341. Finally, the Commission may prescribe such service as shall be "reasonably necessary and proper for the safety, accomodation and convenience of the public . . ." 66 P.S. §1183.

The courts have determined that the primary duty of the Public Utility Commission in the administration of the Public Utility Code is to protect the interests of the public. In Ridley Twp. vs Pa. P.U.C., 172 Pa. Super. 472, 94 A.2d 168 (1953) the court stated that the obligation of the Public Utility Commission to exercise its powers and discretion reasonably applies to the patrons of the utility as well as the utility. Furthermore, the court noted that the "primary object" of the public service laws is at all times to "serve the interests of the public, and not to establish a monopoly or guarantee the security of investment in public service corporations." Supra, p. 172. Also see Sayre vs Pa. P.U.C., 161 Pa. Super. 182, 54 A.2d 95 (1947). In addition, the Pennsylvania Superior Court has held that the powers granted to the Commission were intended to be "broad in order that legislative intent in enactment might be given effect." Reading Co. vs Pa. P.U.C., 188 Pa. Super. 146, 146 A.2d 746 (1959); Sonafelt vs Pa. Public Service Commission, 175 Pa. Super 164, 103 A.2d 442 (1954); Womelsdorf Consol. Water Co. vs Pa. P.U.C., 160 Pa. Super. 298, 50 A.2d 548 (1947).

Pursuant to its duty to protect the public, the Public Utility Commission must prevent and has prevented a public utility from aribtrary or unreasonable discontinuance of service. 66 P.S. §1171. Thus, where a natural gas company had been supplying gas for public consumption for a municipality, it could not summarily discontinue such service without first applying to and obtaining the consent of the Public Service Commission. People's Natural Gas Co. vs Public Service Commission, 79 Pa. Super. 560, (1922) aff'd. 279 Pa. 252, 123 A. 799, aff'd. 270 U.S. 550 (1923). More recently, it was held by the Commonwealth

Court that where a municipality held itself out to supply water services, the Public Utility Commission did not act unreasonably when it ordered the municipality, which had unilaterally rescinded a contract to provide services, to provide such services to a developer of realty. Borough of Phoenixville vs Pa. P.U.C., 3 Cmwlth. 56, 280 A.2d 471 (1971). Since the Commission is also "charged with the duty of protecting the rights of the public", Citizens Water Co. of Washington, Pa. vs Pa. P.U.C., 181 Pa. Super. 301, 124 A.2d 123 (1956), such due process principles must be applied for the protection of the public in the area of termination of services.

In light of the above, it is apparent that the Commission is performing a statutorily created, governmental function of assuring that customers of public utilities receive reasonably continuous service and not be subject to arbitrary termination procedures. Public utilities are thus performing a governmental duty in providing customers with utility services. The services furnished by the public utility, through supervision of the Public Utility Commission thereby become government "entitlements". Such "entitlements" are subject to due process constraints and thus cannot be terminated arbitrarily or unreasonably.

Respondent cites NAACP vs P.U.C. and Philadelphia Electric Co., 5 Cmwth. Ct. 312 (1972) for the proposition that even if a public utility performs a public function, it does not act under color of law. In this regard, it should be noted that such proposition was made in the context of holding that the powers of the Commission do not imply a power to prohibit discrimination in employment as an incident to a rate determination. The court noted that just because utilities were regulated by the state did not mean that their actions "of whatever nature", constituted state action subject to the Fourteenth Amendment protection. Supra, p. 327-328. Thus, the court implied that certain activities of a public utility will constitute state action, while others will not constitute state action, depending upon the "nature" of the action. The Court specifically noted therein that the PUC had no statutory authority to prohibit discrimination in employment, as such was the province of the Pennsylvania Human Relations Commission.

Respondent also points to the fact that it terminated Petitioner's utility services solely pursuant to its own regulations and in the absence of any state authority. Although, as previously noted by Petitioner, the state authority for Respondent to terminate services herein is contained within the Commission's own rules, Pa. P.U.C. Tariff Regulation, Section VIII, as well as within the statutory requirement that all public utility rules be "reasonable" 66 P.S. §1171, the Respondent is also acting under color of law pursuant to state "custom or usage". 42 U.S.C. §1983. The fact that Respondent may have been able to refuse service if in a private capacity, prior to passage of the Public Utility Code, is immaterial. In the instant case, the Respondent is not acting and cannot act in a private, common law capacity herein, since it is acting solely pursuant to statutory authority in providing utility services. In this regard, this Court has specifically held in Griffin vs Maryland, 378 U.S. 130 (1958), at p. 135 that:

> "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity."

Respondent performs a governmental function and terminates utility services pursuant to governmental authority, and thus acts under color of law in depriving Petitioner of a statutorily created entitlement.

CONCLUSION

Although the Respondent is performing a governmental function, it is the cumulative effect of the performance of such public function in conjunction with all of the other indices of state action that leads to the determination that Respondent acts under color of law herein.

For the above reasons the Petition for Writ of Certiorari should be allowed.

Respectfully submitted,
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1/22/74
Date

APPENDIX

Statutes and Regulations

66 P.S. §452
66 P.S. §461
66 P.S. §462
66 P.S. §1101
66 P.S. §1121
66 P.S. §1123
66 P.S. §1171
66 P.S. §1172
66 P.S. §1183
66 P.S. §1341

Pennsylvania P.U.C. Tariff Regulation, Section VIII

Statutory Provisions

Section 452 Commission established; terms of office; qualifications of members; chairman; compensation; quorum

(a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight, and ten years, respectively, from the effective date of this act, but their successors shall each be appointed for a term of ten years. No commissioner, upon the expiration of his term as aforesaid, shall continue to hold office until his successor shall be duly appointed or shall be qualified. Each commissioner, at the time of his appointment and qualification, shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next preceding his appointment, and shall also be not less than thirty years of age.

(b) A member designated by the Governor shall be the chairman of the commission during such member's term of office. When present, the chairman shall preside at all meetings, but in his absence a member, designated by the chairman, shall preside and shall exercise for the time being, all the powers of the chairman.

(c) Each of the commissioners shall receive an annual salary of nineteen thousand dollars ($19,000.00) except the chairman, who shall receive an annual salary of twenty thousand dollars ($20,000.00).

Section 452 (Continued)

(d) Three members of the commission shall constitute a quorum who, for all purposes, including the making of any order or the ratification of any act done or order made by one or more of the commissioners, must act unanimously. 1937, March 31, P.L. 160, §1; 1943, March 31, P.L. 32, §1; 1949, March 31 P.L. 369, No. 32, §1; 1957, July 16, P.L. 949, No. 48, §1.

Section 461 Powers and duties of commission.

The Pennsylvania Public Utility Commission shall exercise the powers and perform the duties exercised and performed prior to the effective date of this act by the Public Service Commission of the Commonwealth of Pennsylvania, and any powers and duties subsequently vested in and imposed upon the Pennsylvania Public Utility Commission by law. 1937, March 31, P.L. 160, §10.

Section 462 Additional powers and duties

The Pennsylvania Public Utility Commission shall have the power and its duties shall be -

(a) To administer and enforce the act, approved the twenty-eighth day of May, one thousand nine hundred thirty-seven (Pamphlet Laws, one thousand fifty-three), designated as the "Public Utility Law", as amended and supplemented, or any law hereafter enacted for the regulation of public utilities.

(b) To certify to the Department of Health any question of fact regarding the purity of water supplied to the public by any public service company or public utility over which it has jurisdiction, when any such question arises in any controversy or other proceeding before it, and upon the determination of such question by the Department of Health, to incorporate the findings of the board thereon in its decision upon the controversy or other proceeding out of which the question arose. 1937, March 31, P.L. 160, §11; 1941, July 8, P.L. 284, §1.

Section 1101 Short title

This act shall be known, and may be cited, as the "Public Utility Law." 1937, May 28, P.L. 1053, art. I, §1.

Section 1121 Organization of public utilities and beginning of service.

Upon the approval of the commission, evidenced by its certificate of public convenience first had and obtained, and not otherwise, it shall be lawful for any proposed public utility.

(a) To be incorporated, organized, or created: Provided, That existing laws relative to the incorporation, organization, and creation of such public utilities shall first have been complied with, prior to the application to the commission for its certificate of public convenience.

(b) To begin to offer, render, furnish, or supply service within this Commonwealth, 1937, May 28, P.L. 1053, art. II, §201. (emphasis added)

Section 1123 Procedure to obtain certificates of public convenience

(a) Every application for a certificate of public convenience shall be made to the commission, in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accomodation, convenience, or safety of the public, and the commission in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) For the purpose of enabling the commission to make such finding or determination, it shall hold such hearings, which shall be public, and, before or after hearing, it may make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination. 1937, May 28, P.L. 1053, art. II, §203. (emphasis added)

Section 1171 Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. IV, §401.

Section 1172 Discrimination in service

No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but nothing herein contained shall be deemed to prohibit the establishment of reasonable classifications of service. 1937, May 28, P.L. 1053, art. IV, §402.

Section 1183 Proper service and facilities established on complaint

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service, or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repair, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accomodation, and convenience of the public, and shall fix the same by its order or regulations. 1937, May 28, P.L. 1053, art. IV, §413.

Section 1341 Administrative authority of commission; regulations.

The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act. 1937, May 28, P.L. 1053, art. IX, §901.

Regulatory Provisions

Pennsylvania P.U.C. Tariff

Section VIII DISCOUNT FOR PROMPT PAYMENT AND PENALTIES FOR DELAYED PAYMENT OF BILLS

Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment.

Federal Statute

42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 73-5845

Catherine Jackson, On Behalf of Herself and
All Others Similarly Situated

VS

Metropolitan Edison Company, A Pennsylvania
Corporation

PROOF OF SERVICE

Alan Linder, Esquire, Tri-County Legal Services, duly sworn, deposes and says that copies of the within Petitioner's Reply Brief have been forwarded by United States mail to counsel for Respondent and all other counsel of record, on the 22nd day of January, 1974, to wit, upon:

a) Russell J. O'Malley, Esquire and Paul A. Barrett, Esquire, 420 Miller Building, Scranton, Pennsylvania 18503.

b) Samuel B. Russell, Esquire, Colonial Trust Building, Reading, Pennsylvania 19601.

c) Edward J. Dailey, Esquire and Richard Ilesse, Esquire, National Consumer Law Center, 1 Court Street, Boston, Massachusetts 02108.

d) James R. Adams, Esquire, Deputy Attorney General, Department of Justice, Capitol Annex Building, Harrisburg, Pennsylvania 17120.

e) Jonathan Stein, Esquire, I. David Pincus, Esquire, David Ackerman, Esquire, Community Legal Services, 313 South Juniper Street, Philadelphia, Pennsylvania .

TRI-COUNTY LEGAL SERVICES

Alan Linder

Alan Linder, Esq.
Attorney for Petitioner

Sworn and subscribed
to before me this 22nd day
of January, 1974.

Valerie G. Berta
NOTARY PUBLIC

My Commission Expires:

VALERIE G. BERTA
Notary Public, Lancaster, Lancaster Co.
My Commission Expires January 20, 1975